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IN THE

Supreme Court of the United States

October Term, 1984

NORTHEAST BANCORP, INC.,
UNION TRUST COMPANY and CITICORP,
Petitioners,

— against —

THE BOARD OF GOVERNORS OF
THE FEDERAL RESERVE SYSTEM,
Respondent,

— and —

BANK OF NEW ENGLAND CORPORATION, CBT CORPORATION, HARTFORD NATIONAL CORPORATION, THE COMMONWEALTH OF MASSACHUSETTS, THE STATE OF CONNECTICUT and BANK OF BOSTON CORPORATION,
Intervenor-Respondents.

AMICUS CURIAE BRIEF OF THE STATE OF NEW YORK IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Interest of the *Amicus Curiae*

This brief *amicus curiae* is respectfully submitted pursuant to Rule 38.4 of this Court on behalf of the State of New York in support of the petition for writ of certiorari.

At issue in this case is the constitutionality of statutes recently enacted by Massachusetts[1] and Connecticut[2] (collectively, the "New England Compact"), which effectively establish an exclusive banking region wherein banks which do not maintain their principal place of business in New England are barred from gaining entrance to the New England banking market. These statutes are manifestly harmful to the interests of the State of New York.

There can be no doubt that the principal targets of this discriminatory scheme are New York banking institutions. The author of the Massachusetts statute, Massachusetts State Senator John A. Brennan, Jr., has all but conceded this:

> "I just didn't think it would be good for the state if the big money center banks came in here." (A 189).

Connecticut State Senator Sullivan, in urging enactment of that state's exclusionary statute, spoke of "the large New York banks", the "fear that they would come into Connecticut," and the need "to get our New England financial institutions in a position where they can withstand the assault of the big money markets." (A 159-60).

To characterize New York as a "big money center" is correct. New York is the financial center of the United States. The financial services industry—comprised of banking, insurance, securities and related institutions—is one of New York's most important industries, employing more than one half million people. Indeed, financial serv-

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1. Mass. Gen. Laws Ann. ch. 167A §2 (West 1971 & Supp. 1984) (A 101-102). (Numbers in parentheses refer to Petitioner's Appendix).

2. 1983 Conn. Act 83-411 (A 97-99).

ices—and particularly banking—are to New York what corn is to Kansas, coal to West Virginia, oil and cattle to Texas.

Although New York is the headquarters of many large banks, it is also the principal place of business of many small banks. The statutes at issue in this case discriminate against *all* New York banks, regardless of size or financial power. Thus, while the articulated rationale supporting the New England Compact cites the need for local control over banking interests and the need to preserve a decentralized banking system in New England, its effect is quite different. Under the New England Compact, a very large bank located in Boston would be permitted to acquire a small, local bank located in rural northwestern Connecticut, although the banks have neither geography nor economic interests in common. The largest bank in Connecticut could merge with the largest bank in Massachusetts. Yet two small banks located a few miles apart in rural areas and serving the same general population—one in upstate New York and the other in western Massachusetts—would not be permitted to merge. Similarly, two small or medium sized banks serving suburban communities—one headquartered in Fairfield County, Connecticut and the other headquartered in neighboring Westchester County, New York—would be prevented from combining.

In short, it is obvious that the primary purpose of the New England Compact is simply to exclude any New York bank—large or small, located upstate or in New York City—from participating in the banking business in New England. This blanket exclusion obviously harms New York banking institutions by depriving them of access to the New England banking market. It also harms New York residents who would benefit from the increased competition,

improved services and lower costs resulting from interstate acquisitions. And it even more fundamentally harms the interests of New York State by denying one of its most vital industries the benefits of free and unencumbered interstate commerce intended by the Framers.

Statement of the Case

Amicus hereby incorporates by reference the Statement of the Case contained in the petition for a writ of certiorari.

Reasons for Granting the Writ

The petition for a writ of certiorari presents novel questions of law of substantial importance to banking institutions, state and federal bank regulators and consumers of banking services.

There is little question that the Connecticut and Massachusetts statutes are openly protectionist, anti-competitive and a substantial burden on interstate commerce.[3] The Second Circuit correctly observed that such state laws vio-

3. When a state restrains commerce in a manner that is openly protectionist, the Court has applied a *per se* rule of unconstitutionality. *Philadelphia* v. *New Jersey*, 437 U.S. 617, 624 (1978); *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27 (1980). Where the burden imposed by a state statute is an evenhanded and incidental one necessitated by a legitimate local concern, a balancing test is employed and the statute held constitutional only if the burden imposed on interstate commerce is not disproportionate to the local benefits. *Pike* v. *Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). The New England Compact fails both tests. A more blantantly protectionist scheme could hardly be imagined. Moreover, as the Federal Reserve Board found, "there are less restrictive means than a discriminatory geographic restriction to accomplish the objectives" of the Connecticut and Massachusetts legislatures (A 60).

late the Commerce Clause absent "clear" congressional authorization (A 30). However, we believe that the court below erred when it found such authorization in Section 3(d) of the Bank Holding Company Act—the so-called Douglas Amendment (A 31).

The decision of the court below does not elaborate on the basis for this finding. Indeed, some uncertainty about its holding is apparent from the fact that the court expressed it as a "belief":

> "We *believe* that, by enacting the Douglas Amendment, Congress authorized Massachusetts and Connecticut to enact the statutes challenged here." (A 31). (Emphasis added).

The language of the Douglas Amendment falls far short of supporting the Second Circuit's "belief" that Congress intended to authorize states to discriminate against their sister states, as Massachusetts and Connecticut have done. This Court has observed that the object of the Douglas Amendment was much narrower:

> "Preliminarily, it is doubtful that § 3(d) authorizes state restrictions of any nature on bank holding company activities. The language of the statute establishes a general federal prohibition on the acquisition or expansion of banking subsidiaries across state lines. The only authority granted to the States is the authority to create exceptions to this general prohibition, that is, to *permit* expansion of banking across state lines where it otherwise would be federally prohibited."
>
> *Lewis* v. *BT Investment Managers, Inc.*, 447 U.S. 27, 47 (1980). (Emphasis in original; footnote omitted).

Nor does the scant legislative history of the Douglas Amendment evince any congressional intent to authorize dismriminatory regional alliances. As the court below noted, at the time the amendment was enacted *no* state permitted its banks to be acquired by foreign state bank holding companies (A 28). Thus, in the words of Senator Douglas, the effect of the amendment would be "to bar the expansion of bank holding companies across State lines" while permitting States "to make explicit provision for such purchases and acquisitions if they so decided." (A 28-29).

When the Federal Reserve Board considered the constitutionality of these laws, it acknowledged that "[t]he Douglas Amendment does not appear *on its face* to authorize discrimination," and that "there is no committee report or other significant legislative history to clarify its meaning." (A 65, 66, emphasis in original). Although it rejected the petitioners' constitutional challenges to the Connecticut and Massachusetts laws, the Board acknowledged that it had "a limited amount of judicial guidance on the issue." (A 67).

The need for judicial guidance was not met by the conclusory decision of the court below. On the contrary, to the extent that the Second Circuit has supplied any guidance at all, its finding that the Douglas Amendment authorized the New England Compact is inconsistent with this Court's holdings.

This Court has held that states may not regulate commerce in a way that would otherwise violate the Commerce Clause absent a grant of congressional authorization that

is "unmistakably clear." *South Central Timber Development, Inc.* v. *Wunnicke,* —— U.S. ——, 104 S. Ct. 2237, 2242 (1984). See, *Sporhase* v. *Nebraska,* 458 U.S. 941 (1982). Congressional intent to grant such authority must be "expressly stated". *Prudential Insurance Co.* v. *Benjamin,* 328 U.S. 408, 427, 431 (1946). "Mere speculation as to what Congress 'probably had in mind' " is not sufficient to overcome the proscriptions of the Commerce Clause. *New England Power Co.* v. *New Hampshire,* 455 U.S. 331, 343 (1982).

The scheme devised by Massachusetts and Connecticut is by its plain terms inimical to the vision of free and unencumbered interstate commerce held by the Framers of the Constitution. Absent congressional authorization that is clear and unequivocal, it must fall. The only such authority that has been proffered is the Douglas Amendment. For the reasons stated above, we do not believe such authority exists in the Douglas Amendment.

Nor do we believe that the Second Circuit was correct in holding that the New England Compact did not violate the Compact Clause. The enactment of reciprocal, exclusive legislation and the consistent cooperation between the states of Massachusetts and Connecticut in this matter (A 153-168) leave little doubt about the existence of a compact. See, *United States Steel Corp.* v. *Multistate Tax Commission,* 434 U.S. 452, 470 (1978); *Virginia* v. *Tennessee,* 148 U.S. 503, 517-518 (1893). The Second Circuit's holding that this is not an unconstitutional compact, one that would increase the power of the New England States or encroach upon the supremacy of the United States, belies logic. The New England Compact will profoundly affect

the interstate banking system, an area of great interest to and extensively regulated by the federal government, and it will do so at the expense of New England's sister states. We believe that this is precisely the sort of scheme the Compact Clause was meant to bar.

Finally, the Second Circuit's reliance on the Federal Reserve Board's conclusion regarding the constitutionality of the Massachusetts and Connecticut statutes is misplaced. The Federal Reserve Board, an admittedly reluctant arbiter of constitutional issues (A 40), employs a narrow standard of review of its own devising. It will not "hold a state statute to be unconstitutional without clear and unequivocal evidence of the inconsistency of the state law with the federal Constitution". *NCNB Corp.*, 68 Fed. Res. Bull. 54, 56 (1982). Needless to say, a judicial determination ought not to rest on so limited a review. As the Federal Reserve Board stated in its brief before the Court of Appeals, "While the Board has initially considered the constitutional questions raised by the Connecticut and Massachusetts statutes, it is ultimately for the courts to decide such issues." (A 195). This plea for judicial scrutiny went unanswered in the Second Circuit and needs to be addressed by this Court.

The need for a prompt and definitive review by this Court is made more urgent by the rapid proliferation of regional banking compacts throughout the country. The states of Georgia and Utah recently enacted statutes similar to those in question here, and the legislatures of approximately 15 other states are giving serious thought to enacting similar legislation. (See Petitioners' Brief at 10-13). If the Second Circuit decision is allowed to stand without

review, it can only presage conflicting decisions in the various circuits and the prospect of undoing complicated mergers and acquisitions if these statutes are ultimately held to be unconstitutional.

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Dated: New York, New York
November 8, 1984

Respectfully submitted,

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